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No. 81-1859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

RALPH LAFAYETTE,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

PETITIONER'S REPLY BRIEF ON MERITS

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1982
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QUESTION PRESENTED FOR REVIEW

Whether the police may search a lawfully arrested individual and a purse he is carrying, without a warrant, as part of a normal booking procedure following a lawful arrest at another location.

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On Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

PETITIONER'S REPLY BRIEF ON MERITS

ARGUMENT

I.

THE ISSUES NOW BEFORE THIS COURT WERE RAISED PROPERLY BELOW.

Respondent's lawful arrest authorized the search of his purse under two separate traditional custodial search theories. First, the arrest authorized an inventory. *South Dakota v. Opperman*, 428 U.S. 364 (1976). Second, it authorized a search incident to arrest. *United States v. Robinson*, 414 U.S. 218 (1973). The State raised both theories in the trial and appellate courts below.

The appellate court analyzed and decided the case under both theories. Accordingly, this Court maintains jurisdiction to decide the case under both custodial search theories.

The Appellate Court of Illinois based its decision regarding inventory directly on the fourth amendment. (A. at 28-30). The court considered no state ground in holding the inventory unreasonable and that it, "violated the fourth amendment". (A. at 30). Thus, this case presents the clear-cut constitutional question of whether the inventory violated the fourth amendment. Therefore, this case is properly before this Court. *See, Delaware v. Prouse*, 440 U.S. 648 (1979). *See also, South Dakota v. Neville*, 43 CCH S.Ct. Bull 778 (February 22, 1983).

Respondent contends, however, that this Court may not decide the issue of search incident to arrest because that question was allegedly not raised properly in the lower courts. Respondent's erroneous contention does not preclude this Court from deciding this case. Respondent asserts that the issue of search incident to arrest "should not be reached since it was rejected by Illinois courts on an adequate and independent state ground, i.e., the Illinois rule that an issue is waived if not raised in a timely fashion". (Respondent's Brief at 21). This Court need not decide whether the issue of search incident to arrest is properly before the Court unless it finds the inventory unlawful. Moreover, the search incident to arrest issue is properly before this Court in that: the Appellate Court of Illinois reached and decided the issue; the court did not base its decision regarding the issue on an adequate and independent state ground; the issue was raised in the trial court; and this Court need not distinguish between inventory and search incident to arrest to decide this case.

Both issues were raised below and now are appropriately before this Court. Respondent concedes the inventory issue was raised below and decided solely on the fourth amendment. Accordingly, both parties agree that the Writ of Certiorari was properly granted and this Court may decide this matter.

A. The Appellate Court Reached And Decided Whether The Search Constituted A Valid Search Incident To Arrest Under The Fourth Amendment.

This Court may consider the issue of search incident to arrest because the Appellate Court of Illinois reached and decided that question. *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Raley v. Ohio*, 360 U.S. 423 (1959).

The Appellate Court of Illinois began its analysis of this case by stating, "[t]he issue presented is whether a warrantless search of the defendant's (Ralph LaFayette) shoulder bag, made during booking procedures following a valid custodial arrest, was unreasonable and, thus violated the defendant's fourth and fourteenth amendment rights." (A. at 25). The court, summarily found, however, that the State waived the argument that the search was reasonable as incident to a lawful custodial arrest by failing to raise it below. Nevertheless, the court went on to devote two full pages of its five and one-half page opinion analyzing and deciding the search incident to arrest question. The court then went on to discuss *United States v. Robinson*; *United States v. Edwards*; *United States v. Chadwick*; and *Arkansas v. Sanders*. The court then devoted one and one-half pages to analyzing the inventory question and discussing *South Dakota v. Opperman*. The court concluded:

> the postponed warrantless search of the defendant's shoulder bag was *neither incident to his lawful*

> *arrest* nor a valid inventory of his belongings and thus, *violated the fourth amendment.*
>
> Accordingly, we affirm the suppression order entered in the Circuit Court of Kankakee County.

(A. at 30) (emphasis added). Thus, the appellate court reached the question of search incident to arrest, discussed it fully and determined that the search violated the fourth amendment, in part, because it did not constitute a valid search incident to arrest.

Jenkins v. Georgia posed a similar situation. The case involved a challenge to a conviction under the Georgia pornography statute. The Georgia Supreme Court decided the case as a matter of state law. *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973). The court, however, went on to discuss and decide the question under first amendment analysis. On appeal, the State argued that this Court could not properly decide the case because the petitioner did not raise the first amendment issue in his state appeal and the lower court decision was supported by adequate state grounds. This Court rejected the State's argument, reasoning:

> whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice.

418 U.S. at 157, *citing, Raley v. Ohio.*

Similarly, in this case, the Appellate Court of Illinois reached and decided the issue of search incident to arrest. The court broadly defined the issue on appeal stating it simply in terms of whether the search, "was unreasonable and thus violated the defendant's fourth and fourteenth amendment rights." (A. at 25). The court then devoted the majority of its analysis to the search incident to arrest issue rather than the inventory ques-

tion. It cited and discussed the relevant decisions of this Court concerning search incident to arrest. Finally, the court held that the search violated the fourth amendment because it was, "*neither* incident to his lawful arrest nor a valid inventory of his belongings." (A. at 30).

Thus, the Appellate Court of Illinois clearly reached and decided the issue of search incident to arrest. Accordingly, this Court may decide that issue.

B. The State Raised The Issue Of Search Incident To Arrest At The Trial Level.

At the trial court hearing on Respondent's motion to suppress, the State summarized its view of the case by stating, "[t]he question is is there a constitutional bar to looking into that bag." (A. at 18). After the hearing, *but before the court's decision* on the motion to suppress, the State submitted a brief in opposition to the motion. Respondent submitted no brief in support of his motion. In its brief, the State argued that the police conducted "a search of defendant's person which extended to all of his personal belongings which he had on him at the time." (A. at 20). The State further argued, "[t]his search may be a full search of the person." *Id.*, *citing*, *United States v. Robinson*. Thus, the State raised the issue of search incident to arrest and cited the controlling authority supporting its position. Respondent, however, alleges that the State failed to raise the issue of search incident to arrest at the trial level because, "its trial court brief in opposition to the motion to suppress which, according to the state raised the [sic] search-incident-to-arrest question, was filed twenty days after the hearing." (Respondent's Brief at 3). Respondent neglects to note that after the hearing the trial court took the

matter under advisement (A. at 18) and Respondent never filed a post-hearing brief in support of his motion to suppress. Although the State's brief was filed twenty days after the hearing, the court received it before rendering a decision on the motion. The trial court did not decide the motion and enter its order until more than a week after receiving the State's brief. (A. at 22).

The decision granting the motion to suppress did not become final until the trial court entered its order suppressing the evidence. *People v. Fuentes*, 91 Ill.App.3d 71, 414 N.E.2d 876 (1980). *See also, United States v. Indrlunas*, 411 U.S. 216 (1972); *Hall Township H.S. Dist. No. 502 v. County Board of School Trustees*, 80 Ill. App.2d 475, 225 N.E.2d 28 (3d Dist. 1967). The Illinois courts have held that an issue may be preserved for appeal by raising it as late as in a post-order motion to reconsider. *See, People v. Holloway*, 86 Ill.2d 78, 91, 426 N.E.2d 871 (1981). Here, the State raised the issue prior to an entry of order on the motion. Thus, the State was timely in raising the issue before the trial court's decision and entry of order.

The Illinois Supreme Court has followed the decisions of this Court in determining whether the government has waived an issue on appeal. In *People v. Keller*, 93 Ill.2d 432 (1982), the Illinois Supreme Court adopted the test set forth by this Court in *Steagald v. United States*, 451 U.S. 204 (1981). The government waives an issue on appeal, "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *People v. Keller*, 438 Ill.2d at 432, *citing, Steagald* at 209.

The State argued at both the trial and appellate levels that the search of Respondent was valid as both an

inventory and as a search incident to arrest. It neither made contrary assertions nor acquiesced in contrary findings by the lower court. Both theories of custodial search were raised in a timely fashion. Accordingly, the State properly raised the issue of search incident to arrest and therefore, did not waive the issue on appeal.

Illinois courts have invariably interpreted state laws governing searches and seizures in accordance with this Court's interpretation of the fourth amendment. This is true not only for the substantive rules regulating searches and seizures but also for the procedural rules governing the right to be free from unreasonable searches and seizures. Thus, Illinois followed *Weeks* long before it was constitutionally required to do so. If this Court were to hold that the issue of search incident to arrest was properly raised under the *Steagald* standard, then there is no doubt that the Illinois courts would hold that the issue was properly raised as a matter of state law.

This Court may determine whether the issue was waived at the trial level because the waiver question was not determined on an adequate and independent state ground. Illinois clearly adopts the federal test for determining whether the State waived an issue on appeal and employed that test here. Accordingly, the decision concerning search incident to arrest was not based on an independent state ground. *Delaware v. Prouse*, 440 U.S. 648 (1979).

C. This Court Need Not Distinguish Between Inventory And Search Incident To Arrest For The Purpose Of Deciding This Case.

Assuming arguendo that the State waived the search incident to arrest argument below, this Court may still

decide this case under that theory because search incident to arrest and inventory are both merely the search of a lawfully arrested individual. The fourth amendment prohibits only unreasonable searches. The search of an individual under lawful arrest, however, has traditionally been deemed reasonable. *United States v. Robinson*. "It is the fact of the lawful arrest which establishes the authority to search . . ." *Id.*, 414 U.S. at 235.

Neither party disputes the lawfulness of Respondent's custodial arrest. (A. at 26). Accordingly, the police maintained the authority to search him.

Professor LaFave has noted, "a pre-incarceration inventory may be justified upon the additional ground that it is a search incident to arrest." 2 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* 309 (1978). Thus, both issues need not be raised separately for a court to determine the reasonableness of a given custodial search of a lawfully arrested pretrial detainee. The central issue for this Court's determination is whether the search of Respondent was reasonable.

II.

THE POST-ARREST SEARCH OF RESPONDENT'S PURSE AT THE POLICE STATION WAS REASONABLE.

A. Respondent's Test For Determining The Reasonableness Of The Inventory Is Unworkable And Contradicts The Holdings Of This Court.

The police inventoried Respondent's belongings pursuant to standard departmental procedures. Respondent concedes that an inventory advances four primary interests: (1) protection of the owner's property while it remains in custody; (2) protection of the police against

claims or disputes over lost or stolen property; (3) the need to maintain jail security and prevent harm to the police; and (4) the need to ascertain or verify the identity of the person arrested. (Respondent's Brief at 13-14). Respondent contends that, "[t]here is *virtually* no need, however, for the police to search inside a shoulder bag in order to advance these interests." (Respondent's Brief at 14) (emphasis added).[1] Respondent further contends, "sealing, securing and inventorying the bag as a unit achieves the first three interests and the fourth interest—the need to verify identity—in most cases will be advanced simply by asking the arrestee to produce identification." (Respondent's Brief at 14).

Thus, Respondent advocates a type of least restrictive means analysis for determining the reasonableness of the search dependent upon the circumstances surrounding the search and arrest. Accordingly, Respondent contests the statement of this Court that, "[t]he decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." *South Dakota v. Opperman*, 428 U.S. at 372.

In advocating his least restrictive means analysis, Respondent ignores that the fact of arrest establishes the authority to search. *United States v. Robinson.* The scope of the search does not depend upon the nature of the offense. In *Robinson*, the police arrested the defendant for a traffic violation, yet this Court held that the police did not violate the fourth amendment by searching inside the

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[1] Apparently, Respondent concedes that there is some need to inventory the bag to advance the relevant interests. Respondent states, "there is *virtually* no need" for the police to search the purse.

defendant's pocket and a closed cigarette package contained within the pocket. The search need not be contemporaneous with the arrest and may take place at the place of detention as well as at the place of arrest. *United States v. Edwards*, 415 U.S. 800, 804 (1974); *Abel v. United States*, 362 U.S. 217 (1960). The circumstances surrounding the arrest simply do not affect the authority to search. As this Court stated in *United States v. Robinson*:

> [t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and discover evidence, does not depend upon what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification.

414 U.S. at 235.

In *South Dakota v. Opperman*, this Court surveyed the lower court holdings concerning inventory and concluded, "'[w]hen the police take custody of any sort of container—be it an automobile, suitcase, or any other thing in which property may be stored—it is reasonable to search the container to itemize the property to be held by the police.'" *quoting, United States v. Gravitt*, 484 F.2d 375, 378 (5th Cir. 1973). In his concurrence in *Opperman*, Justice Powell explained the reasonableness of the post-arrest warrantless search in the context of an automobile inventory, stating:

> [t]he officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police depart-

> ment rules or policy and occur whenever an automobile is seized. There are no special facts for a neutral magistrate to evaluate.

428 U.S. at 383. Accordingly, the post-arrest search of a purse is reasonable.[2] This Court need not determine whether the inventory was the least restrictive means of achieving a particular purpose.

Moreover, the analysis proposed by Respondent would impose unrealistic and burdensome requirements on the police officers who must conduct inventories daily. Respondent and his purse were inventoried in accordance with standard departmental procedures. (A. at 26).[3] Respondent would have the police randomly vary from that procedure depending on the circumstances of the arrest.

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[2] *See, United States v. Graham*, 638 F.2d 1111 (7th Cir. 1981); *United States v. Venizelos*, 495 F.Supp. 1273 (S.D.N.Y. 1980); *People v. Harris*, 105 Cal.App.3d 304, 164 Cal. Rptr. 296 (1980); *Dawson v. State*, 40 Md.App.2d 601, 395 A.2d 160 (1978); *Stewart v. State*, 611 S.W.2d 434 (Tex. Crim. App. 1981); *State v. Sabater*, 3 Kan.App.2d 601, 692 P.2d 11 (1979).

See also, cases upholding the post-arrest stationhouse search of a wallet: *United States v. Baldwin*, 644 F.2d 381 (5th Cir. 1981); *United States v. Sonntag*, 684 F.2d 781 (11th Cir. 1982); *United States v. McEachern*, 675 F.2d 618 (4th Cir. 1982); *United States v. Passaro*, 624 F.2d 938 (9th Cir. 1980); *United States v. Ziller*, 624 F.2d 562 (9th Cir. 1980); *United States v. Phillips*, 607 F.2d 808 (8th Cir. 1979).

But cf., People v. Bean, 107 Ill.App.3d 662, 437 N.E.2d 1295 (3d Dist. 1982), *cert. pending*, No. 82-948.

[3] In addition to Kankakee police procedures, Illinois law requires that, "[a]n inventory of all instruments, articles or things seized on a search without a warrant shall be given to the person arrested and a copy thereof delivered to the judge before whom the person arrested is taken * * *. If the person arrested is released without a charge being preferred against him all instruments, articles or things seized, other than contraband, shall be returned to him upon release." Ill.Rev.Stat., ch. 38, Section 108-2.

If "[t]he need to conduct a search in each type of inventory is different," (Respondent's Brief at 10), then the police must engage in a delicate balancing of constitutional issues each time they take someone into custody. This proposal is untenable given the vast number of arrests throughout the country each year.[4] Moreover, this Court has refused to require the police to engage in such a complex analysis. Quoting one commentator, the Court stated:

> 'Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.'

New York v. Belton, 453 U.S. at 141, *quoting*, LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S.Ct. Rev. 127, 141 (1974).

Thus, Respondent advocates that the police be required to engage in a free form balancing of complex issues to determine the least restrictive means of inventorying the

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[4] F.B.I. statistics indicate that in the year preceding Respondent's arrest, police officers across the country made more than 10.2 million arrests. *1979 F.B.I. Uniform Crime Reports*, table 24 at 188. Respondent would require that in each instance, the police undertake a constitutional analysis to determine whether the search protects the interests advanced by an inventory.

belongings of a lawfully arrested individual. Accordingly, Respondent's analysis is unworkable and contradicts the holdings of this Court.

B. Respondent's Alternative For Inventorying His Purse Would Not Protect The Interests Traditionally Advanced By An Inventory.

Respondent erroneously contends that, "sealing, securing and inventorying the bag as a unit," protects the interests advanced by an inventory. This method fails to sufficiently achieve the purpose of an inventory.

Respondent's suggested inventory method would neither adequately protect the owner's property nor protect the police against false claims of stolen property. Prisoners frequently accuse their jailors of stealing.[5] A thorough standardized inventory procedure which allows the individual to observe the itemization of his property and sign an inventory list, ensures that the individual will retrieve all the items he brought into the facility and discourages police or jail authorities from tampering with

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[5] *See* cases involving prisoner allegations of jailor wrongdoing regarding prisoner personal property: *Loftin v. Thomas*, 681 F.2d 365 (5th Cir. 1982); *Madyun v. Thompson*, 657 F.2d 868 (7th Cir. 1981); *Kimbrough v. O'Neill*, 523 F.2d 1057 (7th Cir. 1975); *Moore v. Gluckstein*, 548 F.Supp. 165 (D. Maryland 1982); *Falzerano v. Collier*, 535 F.Supp. 800 (D. N.J. 1982); *Hendrix v. Faulkner*, 525 F.Supp. 435 (N.D. Ind. 1981).

The Illinois Department of Corrections employs full-time personnel at its correctional facilities to deal with the problem of resident personal property. Extensive departmental and institutional administrative regulations govern the actions of correctional officers concerning resident personal property. *See e.g.*, Illinois Department of Corrections *Administrative Regulations*. Nonetheless, officials estimate that they receive in excess of 250 resident grievances each year alleging that correctional officers lost, stole, or damaged personal property.

the individual's possessions. It also prevents the individual from claiming the police deprived him of an item which he, in fact, did not possess at the time of the inventory. Respondent's alternative would encourage false claims against the police because there would be no way of knowing what the individual brought with him.

Respondent's suggested inventory method would jeopardize the security of the detention facility. If police were required to simply seal and store a purse they could not ascertain whether its contents posed any threat to the safety of the institution. Although the instances of a firearm, explosive or some other dangerous object being present in the purse might not be common, there is often nothing which would alert the police to the presence of such items absent an inventory. Justice Powell explained this dilemma with respect to automobiles in his concurrence in *Opperman*, stating:

> Except in rare cases there is little danger associated with impounding unsearched automobiles. But the occasional danger that may exist cannot be discounted entirely. *See Cooper v. California*, 368 U.S. 58 (1967). The harmful consequences in those rare cases may be great, and there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk.

428 U.S. at 378. Similarly, the harmful consequences of storing an uninventoried purse may be great and there is no effective way of determining in advance whether a particular situation presents a greater risk. Moreover, any such determination would have to occur on a case-by-case basis, thereby requiring that the police engage in the ad hoc balancing this Court has rejected. *See, New York v. Belton*, 453 U.S. at 458.

Respondent's suggested inventory method would prevent police from effectively ascertaining the identification of the arrestee. Respondent contends that police can verify identity, "simply by asking the arrestee to produce identification". (Respondent's Brief at 14). This alternative would hinder effective verification and increase the danger to police officers. If an arrestee is allowed to verify his identity himself, he could easily produce false identification which would corroborate the false name or address he has given police. Respondent's method prevents police from determining whether Respondent has chosen from false and authentic identification contained in the purse. Furthermore, Respondent's method exposes the police to the danger that the arrestee will reach inside the purse for the purpose of producing identification and withdraw a weapon or some other harmful object.

Thus, Respondent's suggested inventory method fails to protect the interests advanced by the thorough inventory conducted in accordance with Kankakee police procedures.

III.

ANY LIMITED EXPECTATION OF PRIVACY WHICH RESPONDENT MIGHT HAVE MAINTAINED IN HIS PURSE DID NOT OUTWEIGH THE SIGNIFICANT AND LEGITIMATE SECURITY INTEREST OF THE STATE IN INVENTORYING THE PERSONAL EFFECTS OF PRETRIAL DETAINEES.

The search of Respondent after his lawful arrest was reasonable. "It is the fact of the lawful arrest which establishes the authority to search . . ." *United States v. Robinson*, 414 U.S. 218, 235 (1973). Respondent concedes the lawfulness of the arrest yet argues that the inventory

was unreasonable because Respondent, "had a high expectation of privacy in the contents of the bag and there was no need for the police to search inside it." (Respondent's Brief at 9).

Upon his arrival at the Kankakee police station, Respondent became a pretrial detainee—"those persons who have been charged with a crime but who have not yet been tried on the charge." *Bell v. Wolfish*, 441 U.S. 520 523 (1979). "[G]iven the realities of institutional confinement, any reasonable expectation of privacy that a detainee retain[s] would necessarily be of a diminished scope". *Id.* at 557.

In *Bell* this Court rejected challenges to body cavity searches of pretrial detainees and inmates conducted at the New York Metropolitan Correctional Center (MCC). The searches occurred after contact visits with persons residing outside the prison. The visits took place in a glass enclosed room and were continuously monitored by corrections officers. The inmates wore only one-piece jumpsuits with zippers in the front. Corrections officers checked visitors and their packages with metal detectors, fluoroscopes, and by hand, before permitting entry into the visiting room. Additionally, the officers could require visitors to leave their handbags or packages outside the visiting room. MCC policies required a cavity search of residents after each visit.

The plaintiffs charged that the searches violated their reasonable expectation of privacy protected by the fourth amendment. This Court noted, "[w]e do not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. Nevertheless, the Court balanced, "the significant and legitimate security interests of the institution against the privacy

interest of the inmates," and concluded that the searches were reasonable. *Id.*

Thus, a pretrial detainee retains only a minimal expectation of privacy. The expectation of privacy in a person's own body may be outweighed by significant State security interests. Accordingly, the expectation of privacy in Respondent's purse is clearly outweighed by the significant and legitimate security interests of the Kankakee Police in inventorying the immediate personal effects of pre-trial detainees worn by them to the police station.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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